No. 87-1661 (2)

In The

Supreme Court of the United States

October Term, 1987

ASARCO, Incorporated, et al.,

Petitioners,

v.

Frank and Lorain Kadish, et al.,

Respondents.

ON PETITION FOR A WRIT CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

RESPONDENTS' BRIEF IN OPPOSITION

DAVID S. BARON
Arizona Center for Law
in the Public Interest
3208 East Fort Lowell
Suite 106
Tucson, Arizona 85716
(602) 327-9547

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

2pp

QUESTION PRESENTED

Pursuant to the 1910 Arizona Enabling Act, Congress granted to the State of Arizona millions of acres of land to be held in trust for the benefit of the state's public school system. Such lands were to be sold or leased only for their "true value" as established by appraisal. Under the Jones Act of 1927, Congress specifically "extended" this land grant to include mineral lands and directed that this additional grant should "be of the same effect" as the original one in 1910. Despite the inclusion of minerals in the trust, the State of Arizona has for years disposed of school trust minerals under a statute that actually prohibits individual appraisal of mineral lands and imposes one inflexible royalty rate for all minerals extracted. The statute further requires that royalties be calculated as a percentage of net mineral value - that is, the value after deduction of production costs - a practice that in some cases mandates an outright giveaway of school trust mineral resources.

The question presented is whether the Arizona Supreme Court correctly invalidated this statute under the Arizona Constitution and the Enabling Act as a breach of the state's trust responsibilities to maximize revenues for the benefit of the public schools.

LISTINGS REQUIRED BY RULE 28.1

The Arizona Education Association (AEA) is a non-profit corporation affiliated with the National Education Association (Washington, D.C.). The AEA has local affiliates of its own in approximately 130 Arizona school districts (e.g., Tucson Education Association, Flagstaff Education Association, Mesa Education Association).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES–Continued

Page

CONSTITUTION, STATUTES AND REGULATIONS:

TABLE OF AUTHORITIES–Continued

No. 87-1661

In The

Supreme Court of the United States

October Term, 1987

ASARCO, Incorporated, et al.,

Petitioners,

v.

Frank and Lorain Kadish, et al.,

Respondents.

ON PETITION FOR A WRIT CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Frank and Lorain Kadish, Marion Pickens, and the Arizona Education Association hereby oppose the petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Arizona in this case.

COUNTERSTATEMENT OF THE CASE

For purposes of this brief, respondents incorporate the statement of facts and historical background as set forth by the Arizona Supreme Court. Petition for Writ

of Certiorari (Petition) at 2a. The following statement notes several significant omissions and mischaracterizations by the petitioners.

The petitioners do not fully explain the nature and impact of the mineral royalty statute invalidated by the Arizona Supreme Court. In Arizona, school trust lands are administered by the Arizona State Land Commissioner. Ariz. Rev. Stat. Ann. §§ 37-101, -131. Under the mineral royalty statute, however, the State Legislature has prescribed a fixed royalty formula that must be followed by the Commissioner in disposing of school trust minerals. Under the statute, Ariz. Rev. Stat. Ann. § 27-234(B), the royalty for extraction of minerals from state land must in every case be 5% of the net value of the minerals produced: the Commissioner is not allowed to first appraise the value of the mineral lease-hold to determine its true value, and has no discretion whatsoever to vary the royalty rate for different minerals or varying qualities of ore. Moreover, the Commissioner must calculate the royalty as a percentage of the "net value" of the minerals: that is, the value *after* deduction of various costs of processing, transportation, and taxes. Where these costs exceed the gross mineral value, the "net value" - and consequently the royalty - is zero. Thus, as the court below found, under § 27-234(B) "it is possible for a lessee to extract minerals from school trust lands and pay no royalty whatsoever." Petition at 26a.

According to the Arizona Auditor General, Arizona is the *only* state with a fixed, non-negotiable royalty

rate for mineral leases. Petition at 25a. In other states, royalty rates are set through competitive bidding, administrative regulation, or case-by-case negotiation. *See, e.g.*, Cal. Pub. Res. Code §§ 6895, 6897 (West Supp. 1987); N.M. Stat. Ann. §§ 19-8-14, -22, -33 (Supp. 1985); Okla. Stat. Ann. tit. 64, §§ 454, 455, 458 (West 1964); S.D. Codified Laws Ann. §§ 5-7-11.1, -12 (1985); Tex. Nat. Res. Code Ann. §§ 32.1071, -.1073 (Vernon Supp. 1988); Wyo. Stat. § 36-6-101 (Supp. 1987). Moreover, other states avoid the outright giveaway of trust minerals by either requiring minimum royalty payments or calculating royalties as a percentage of gross mineral value. *See, e.g.*, Petition at 26a; Cal. Pub. Res. Code § 6895 (West Supp. 1987). Texas Nat. Res. Code Ann. § 32.1073 (Vernon Supp. 1988); Utah Code Ann. § 65-1-18.

Petitioners correctly note that Congress imposed more stringent trust restrictions on Arizona than on previously admitted states. However, the reason for the tougher restrictions on Arizona was not merely - as petitioners assert - that previously admitted states had allowed school lands to be "diverted to other uses." Congress was primarily concerned that trust resources in other states were being sold "at unreasonably low prices," thereby depriving the beneficiaries of the "full benefit" of the grant. *Lassen v. Arizona,* 365 U.S. 458, 464, 589 (1967). Accordingly, the Arizona Enabling Act specifically prohibited the disposal of trust lands, leaseholds, and other products without prior appraisal and for less than their "true value." Arizona Enabling Act of

1910, Pub. L. No. 219 (Ch. 310), 36 Stat. 557 § 28 (Enabling Act).[1]

Petitioners also mislead in asserting that the Jones Act "did not amend the New Mexico-Arizona Enabling Act . . . or any other state's enabling act." Petition at 4. The enabling acts for Arizona and other western states granted to the states specified numbered sections for school trust purposes, except where those sections were mineral in character. The Jones Act expressly amended those enabling acts by providing that "the several grants to the states of numbered sections in place for the support or in aid of common or public schools . . . *are, extended* to embrace numbered school sections mineral in character." 43 U.S.C. § 870 (emphasis added). The statute further provided that the grant of mineral sections "shall be of the same effect" as the prior grants. 43 U.S.C. § 870(a).

Regarding the proceedings below, respondents did not allege in their complaint - as petitioners imply - that the royalty statute violated the Enabling Act's

---

[1] Petitioners incorrectly paraphrase the Enabling Act as imposing restrictions "on how Arizona (and New Mexico) could dispose of the nonmineral lands and surface assets that were granted to them by that act." Petition at 3. The actual language of the Enabling Act does not limit the trust restrictions to nonmineral lands and surface assets: rather, it applies the true value and appraisal requirements to "[a]ll lands, leaseholds, timber, and other products of land." Enabling Act § 28. Likewise, the Act declares that "[d]isposition of any of said lands, *or any money or thing of value* directly or indirectly derived therefrom . . . in any manner contrary to the provisions of this Act shall be deemed a breach of trust." *Id.* (emphasis added).

public auction requirements. The complaint sought invalidation only of the statutory royalty formula, and did not address Arizona's procedures for granting leases. Likewise, the Arizona Supreme Court did not address whether public auction of mineral leases is required. The public auction issue, therefore, is simply not before this Court.

Finally, respondents note that even the lone dissenting justice in the Arizona Supreme Court agreed that "mineral lands are included in the corpus of the state trust properties" and the state is under fiduciary duty to maximize revenues therefrom. Petition at 33a-34a. He did not at all support the proposition that the legislature has totally unfettered discretion to dispose of trust mineral assets as it wishes.

REASONS FOR DENYING THE WRIT

The decision below addresses a problem unique to Arizona under constitutional and statutory provisions unique to Arizona. The mineral royalty statute struck down by the Arizona Supreme Court sets a fixed, non-negotiable royalty rate for all minerals on all school trust lands, and in some cases mandates the outright giveaway of trust minerals. No other state limits trust royalties in this manner. Moreover, the court below struck down the royalty statute based not only on its reading of the Jones Act, but also on specific 1951 amendments to the Arizona Enabling Act expressly exempting *only* oil and gas leases from the trust's prior

appraisal requirement. Likewise, the court's construction of the Jones Act is unlikely to disrupt settled trust practices in other states: the court simply held that the Act subjected minerals to the same trust requirements imposed by the respective enabling acts on trust assets generally. Thus, the decision below does not in any way suggest that Arizona's more stringent trust requirements must apply in other states - instead, the case simply suggests that minerals are subject to whatever trust requirements each state already has.[2]

1. Petitioners assert that the decision below conflicts with *Jensen v. Dinehart,* 645 P.2d 32 (Utah 1982). That case, however, is simply not analogous. In *Jensen,* the sole question before the court related to the proper disposition of the *proceeds* of mineral leases of school lands - not the royalties that should be charged. The dispute in the case arose because, after passage of the Jones Act, Utah began placing all of its trust mineral revenues in a currently expendable fund rather than in the perpetual fund established under the original Enabling Act (from which only the interest could be

---

[2] Petitioners assert that the decision below will cause uncertainty in state land management in other western states, citing as examples, Idaho, Montana and Washington. Yet these states, for all practical purposes, already treat minerals as trust assets - generally allowing the state land agency to set appropriate royalty rates and offer mineral leases at public auction. *See, e.g.*, Idaho Code § 47-704 (Supp. 1987); Mont. Code Ann. §§ 77-3-101, -116, 77-2-321 (1987). Accordingly, petitioners' assertion that the decision below will have "an unsettling effect" on leasing systems in these states is at best blind speculation.

used for current expenditures). The Utah Supreme Court simply held, that under the terms of the Jones Act, it was permissible for the state to deposit mineral proceeds in the currently expendable account.

Contrary to petitioners' suggestion, the court in *Jensen* did not hold that minerals were free from all trust restrictions. In reaching its decision, the court cited language in the Jones Act specifically addressing the disposition of mineral *proceeds:* in particular, the provision stating that " 'the proceeds on rentals and royalties' " from mineral leases were " *'to be utilized for the support* or in aid of the common or public schools.' " 645 P.2d at 34 (emphasis added by the court). The Utah Supreme Court read this explicit language as to disposition of proceeds - which is somewhat less restrictive than the perpetual fund provision in the original Utah Enabling Act - as controlling with respect to minerals.[3] The *Jensen* decision has never been cited by another court for the much more expansive proposition urged by

---

[3] Petitioners misleadingly quote the decision as holding that the Jones Act "left Utah '[a]s a sovereign state . . . free and unfettered' to manage its mineral leasing program for the support of its public schools unencumbered by the highly restrictive provisions of the Enabling Act that governed proceeds from non-mineral school lands and surface assets." Petition at 8. In reality, the portion of the decision being quoted simply stated: "As a sovereign state, it [Utah] was free and unfettered to place mineral proceeds from the school sections in the Uniform School Fund." 645 P.2d at 35. Nowhere does the court state that the Jones Act freed Utah's mineral leasing program from all of the provisions of that state's enabling act.

petitioners - namely, that the Jones Act freed mineral lands from *all* trust restrictions.[4]

In reality, the opinion below is fully consistent with a long line of decisions rigorously enforcing the school land trusts. *See, e.g., Alamo Land & Cattle Co. v. Arizona,* 424 U.S. 295 (1976); *Lassen v. Arizona,* 385 U.S. 458 (1967); *Ervien v. United States,* 251 U.S. 41 (1919); *State ex. rel. Ebke v. Board of Educational Lands,* 47 N.W.2d. 520 (Neb. 1951). Courts in western states have uniformly rejected efforts to circumvent school trust restrictions or waste trust assets. *See, e.g., Gladden Farms, Inc. v. State,* 633 P.2d 325 (Ariz. 1981); *Department of State Lands v. Pettibone,* 702 P.2d 948 (Mont. 1985); *Oklahoma Education Association v. Nigh,* 642 P.2d 230 (Okla. 1981); *Fox v. Kneip,* 260 N.W.2d 371 (S.D. 1977); *County of Skamania v. State,* 685 P.2d 576 (Wash. 1984). Thus, the decision below is hardly a startling development or change in direction.

2. Petitioners strain to characterize the decision below as creating a conflict in federal-state relations. The "conflict" is wholly imaginary. This is a straightforward case of enforcing the explicit terms and conditions of an express trust - terms and conditions that have been specifically accepted by the State of Arizona in its Constitution and statutes. Ariz. Const. Art. 10 § 1; Ariz. Rev. Stat. Ann § 37-710. The two principal cases

---

[4] Indeed, for royalty purposes, Utah treats minerals as trust assets. Royalty rates are set by regulation and adjusted when "in the best interest of the trust." Utah Admin. R. 632-20-10.2. Some mineral lands are leased at public auction. *Id.* R. 632-20-15, -16.

relied on by petitioners on this point are both totally inapplicable: One involved imposition of conditions under a non-trust federal grant program, and the other involved the traditional federal deference to states in setting criminal laws. *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1 (1981); *United States v. Bass,* 404 U.S. 336 (1971). The rule of construction with respect to school land grants to the states is unambiguous: All doubts must be resolved *in favor of* protecting and preserving trust purposes. *United States v. New Mexico,* 536 F.2d 1324, 1326-27 (10th Cir. 1976). Clearly, trust purposes are not served by allowing the state to literally give away trust assets.

The claim of state-federal conflict carries a particularly hollow ring in this case. The decision below was entered by a state court - not a federal court - under provisions of *both* the state constitution and the federal Enabling Act.[5] Even more significant is the fact that the State of Arizona, although a party below, is not seeking review of the Arizona Supreme Court's decision. Nor has the state chosen to participate as amicus curiae in support of the petition for certiorari. Clearly,

---

[5] Contrary to petitioners' assertion (Petition at 7 n.1), the Arizona Constitution does provide an independent and adequate state law ground for the decision below. The Arizona Supreme Court plainly struck down the mineral royalty statute under *both* the Arizona Constitution and the Enabling Act. Petition at 2a, 24a, 27a, 29a. Even if the Enabling Act did not require application of trust restrictions to minerals, there is nothing to prevent Arizona from construing its own Constitution as so mandating.

the state does not see the decision below as an unwarranted interference with its sovereign rights.

3. Petitioners complain that the decision below "upsets years of settled private expectations and unravels longstanding state policy." The assertion is both completely irrelevant and totally inaccurate. As this Court recently held, claims by private parties of "settled" expectations to interests in state lands are entitled to no weight where those expectations are not reasonable. *Phillips Petroleum Co. v. Mississippi,* 108 S. Ct. 791, 798-99 (1988). Here, Arizona mining interests had absolutely no right to expect that the statutory royalty formula would remain unchanged in perpetuity. This would be true even if there were no school land trust at all. Nor could such persons possibly claim a reasonable expectation that the statutory royalty formula would be upheld by the courts. The issue had been only once before addressed by an Arizona appellate court, and that court specifically indicated that a statutory limitation on royalties would be unconstitutional. *State Land Department v. Tucson Rock and Sand Co.,* 12 Ariz. App. 193, 195, 469 P.2d 85 (1970), *vacated on other grounds,* 107 Ariz. 74, 481 P.2d 867 (1971).[6]

---

[6] Petitioners also rely on the fact that the Attorney General of the United States has never contested Arizona's mineral royalty statute even though the Enabling Act specifically authorizes him to do so. But the Enabling Act makes clear that the grant of enforcement authority to the Attorney General shall not "be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act." Enabling Act § 28. Accordingly, no one can presume the validity of a state leasing practice merely because the Attorney General does not choose to challenge it.

4. The opinion below thoroughly explains why the trust restrictions necessarily apply to minerals, and why petitioners' contentions to the contrary are meritless. The Jones Act "extended" the original school trust grant to include mineral lands, and expressly provided that this grant "shall be of the same effect"[7] as the original grants. 43 U.S.C.§ 870(a). In so directing, Congress clearly intended that mineral lands "should be held for the school trust purposes and under the same trust and dispositional restrictions" as the previously vested nonmineral sections. Petition at 10a. Because the Arizona Enabling Act imposed its trust restrictions on "[a]ll lands, leaseholds, timber and other products of land", mineral lands became subject to the trust restrictions as soon as they vested under the 1927 Act. *Id.*[8]

In authorizing the leasing of mineral lands "as the state legislature may direct" or in such "manner" as the

---

[7] Petitioners assert that the quoted language is merely a reference to the nature of the actual grant of land - that is, the type of property interests conveyed to the state. Petition at 11. Such a construction is totally unsupportable, however because the "type of property interest conveyed" is expressly defined in other provisions of the Jones Act. *See, e.g.*, 43 U.S.C. §§ 870(b), (c), & (d). Petitioners' reading of the "same effect" clause would render that language little more than meaningless and irrelevant surplusage.

[8] Page 10a of the Petition for Certiorari - a reprint of the Arizona Supreme Court's decision - contains a typographical error. On the fourth line from the top of the page, the word "not" should read "now". *Kadish v. Arizona State Land Department*, No. CV-86-0238-T, slip op. at 12 (Ariz. Sup. Ct. Dec. 10, 1987).

legislature may direct, Congress was plainly not freeing minerals from the trust restrictions. Courts have consistently construed such language as granting *only* the authority to establish leasing forms and procedures: not to obliterate trust restrictions. Petition at 14a; *State Land Department v. Tucson Rock & Sand Co.*, 12 Ariz. App. 193, 195, 469 P.2d 85, 87 (1970), *vacated on other grounds*, 107 Ariz. 74, 481 P.2d 867 (1971); *Oklahoma Education Association v. Nigh*, 642 P.2d 230, 237 (Okla. 1982). The contrary construction urged by petitioners would exempt more than just mineral leases from the trust. Under the Arizona - and other - enabling acts, the legislature is also authorized to determine the "manner" of grazing, agricultural, commercial, and domestic leases. Yet Congress clearly did not intend to exempt all of these leases from the trust restrictions. *See Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295 (1976).

The 1951 amendments to the Arizona Enabling Act provide an added and independent basis for concluding that the Act's trust restrictions apply to minerals. Under those amendments, Congress explicitly authorized oil and gas leases on school trust lands "with or without advertisement, bidding, or appraisement." Petition at 19a. No such express exemption was provided for any other leases, including mineral leases. As the court below concluded, the language of these amendments makes clear that Congress fully intended to apply the prior appraisal requirement to mineral leases.

5. This Court has already addressed the applicability of trust restrictions to leases in *Alamo Land &*

Cattle Co. v. Arizona, 424 U.S. 295 (1976). There, the Court expressly found that the Arizona Enabling Act prohibits "the initial setting of *lease rentals* at less than fair rental value." *Id.* at 304-05 (emphasis added). Although the case involved a grazing lease, the material provisions of the Enabling Act are the same: both grazing and mineral leases are authorized "in such manner" as the legislature may prescribe. The fact that the Court did not dwell upon the "in such manner" language or discuss the Jones Act is of absolutely no consequence - the Court plainly concluded from the overall context of the Enabling Act that leases were subject to the appraisal and true value requirements. In seeking a different result here, petitioners are asking this Court to upset long-standing and well-settled precedent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

David S. Baron
Arizona Center for Law
in the Public Interest
3208 East Fort Lowell
Suite 106
Tucson, Arizona 85716
(602) 327-9547

Counsel for Respondents

May 24, 1988